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March 11, 1994

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

Mr. Andrew S. Fishel
Managing Director
Federal Communications Commission
Room 852
1919 M Street, N.W.
Washington, D.C. 20554

RE: General Docket No. 90-314
Rules to Establish New Personal Communications Services

Dear Mr. Fishel:

On February 8, 1994, QUALCOMM Incorporated ("QUALCOMM"), by its attorneys, took the unusual step of notifying you of an apparent violation of the Commission's ex parte rules.^{1/} Our concern stemmed from the Commission's reliance in its Third Report and Order in the above-captioned proceeding (FCC 93-550, released February 3, 1994), on a "Semi-annual Experimental License Progress Report" filed on August 19, 1993 by Omnipoint. In that Report, Omnipoint made gratuitous, disparaging and incorrect remarks about QUALCOMM and QUALCOMM's PCS technology. That Report, like most or all of the Experimental License Reports filed in this Docket, was not served on any party and was not subject to informed criticism. Indeed, that Report was filed after the close of the Comment period on the pioneer's preference aspect of this Docket. QUALCOMM first requested, on September 15, 1993, that the

^{1/} Omnipoint Corporation ("Omnipoint") has asserted that QUALCOMM's February 8, 1994 letter constitutes an improper ex parte presentation. QUALCOMM objects to this characterization. Although QUALCOMM believes that it has more than satisfied the Commission's Rules by serving the February 8th letter on your office and on Omnipoint and its counsel, QUALCOMM is pleased to inform all parties to this proceeding of its view that Omnipoint has violated the Commission's ex parte rules. QUALCOMM notes that Omnipoint's views concerning QUALCOMM's February 8 letter are particularly ironic in light of Omnipoint's complaint about the wide circulation of another ex parte complaint. See Letter from Mark J. Tauber, Ronald L. Plessner and Mark J. O'Connor to Andrew S. Fishel dated February 1, 1994. Nonetheless, QUALCOMM is serving this reply, as well as its February 8th letter, on all parties to the proceeding.

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Commission strike the Omnipoint Report as an impermissible ex parte filing. When the Commission failed to act on that request in its Third Report and Order but instead relied on the Report in its decisionmaking, QUALCOMM drew this matter to your attention.

Omnipoint responded to QUALCOMM's letter on February 23, 1994 by suggesting that the Commission "simply ignore" the QUALCOMM letter. While Omnipoint may consider enforcement of the Commission's ex parte rules something that can be "simply ignored", QUALCOMM does not. QUALCOMM expects that you will address our allegation of an ex parte violation that contaminates this proceeding.

At the heart of the issue brought to your attention by QUALCOMM is the role that the Omnipoint Progress Report played in the Commission's decisionmaking. It is questionable whether any submission in this proceeding that has not been subjected to the crucible of informed criticism can be relied upon. Courts have recognized the need for adversarial discussion among the parties. In the seminal case leading to the Commission's present ex parte rules, the Court of Appeals stated:

The importance of such discussion to the proper functioning of the agency decisionmaking and judicial review processes is evident in our cases. We have insisted, for example, that information in agency files or consultant's reports which the agency has identified as relevant to the proceeding be disclosed to the parties for adversarial comment.^{2/}

In other words, **the Commission's reliance upon a Progress Report that has not been served on the parties and not subjected to adversarial comment, jeopardizes the outcome of the proceeding.** This is not a matter that the Commission can "simply ignore", as much as Omnipoint may desire that outcome.

With specific regard to the arguments raised in the Omnipoint February 23 letter, we first note that this matter does not concern the Office of Engineering and Technology's decision not to accept our Supplemental Comments in Docket 90-314. Although QUALCOMM

^{2/} Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1977) (footnote omitted) (emphasis added). See also U.S. Lines v. Federal Maritime Commission, 584 F.2d 519 (1978); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (1973), cert. denied, 417 U.S. 921 (1974).

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did not agree with the Chief Engineer's decision, we accepted it and chose not to apply for review. The subjects of our February 8 letter were the Omnipoint Progress Report which contained the damaging ex parte comments about QUALCOMM's PCS technology, the Commission's failure to address our Motion to Strike that Progress Report, and the Commission's reliance on that Report in the Third Report and Order.

Next, Omnipoint's letter claims that it "merely described the QUALCOMM approach . . . without making any disparaging remarks". First, this statement by Omnipoint demonstrates most clearly QUALCOMM's concern. **There is no reason to "describe the QUALCOMM approach" in an Omnipoint Progress Report.** The purpose of an Experimental License Progress Report is to describe the tests conducted on the licensee's system, not to criticize, compare or even describe another system which was not the subject of its experiments. A Progress Report that is not limited to an evaluation of the licensee's system clearly falls outside whatever minimal protection may be afforded by Section 1.1204 (b) of the Commission's ex parte rules. Second, the remarks made by Omnipoint about the QUALCOMM system are, by any fair reading, disparaging. In addition to its entire Appendix, captioned "QUALCOMM's OFS Sharing Analysis is Severely Flawed in Several Ways", there are several textual references to QUALCOMM. For example, Omnipoint included the following discussion of what it refers to as a "CDMA-only system"^{3/}

There are even more subtle problems with comparing the "capacity" of such disparate PCS systems. With a CDMA-only system, as cell sizes shrink and more cells are operating in proximity, interference rises. One recent study by Rappaport and Milstein, ("Effects of Radio Propagation Path Loss on DS-CDMA Cellular Frequency Reuse Efficiency for the Reverse Channel", IEEE Transactions on Vehicular Technology, August 1992) indicates that CDMA-only systems will experience a six-fold reduction in capacity as cells are reduced from 10 kilometer to 2 kilometer radii.^{4/}

This statement is not only disparaging, it is inaccurate. And it is totally irrelevant to a Progress Report on the Omnipoint system. When Progress Reports become exercises in advocacy, as this

^{3/} The Omnipoint Progress report uses the terms "QUALCOMM system" and "CDMA-only system" interchangeably. There is no question that Omnipoint is referring to the QUALCOMM system.

^{4/} Omnipoint Corporation, Semi-annual Experimental License Report - No. KK2XCV, File No. 2174-EX-PL-91, August 19, 1993, at 8 (emphasis in original).

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Report surely is, the Commission is obligated to expose the Report to "adversarial discussion". This principle lies at the heart of the Commission's ex parte rules.

In view of the Commission's failure to subject the Omnipoint Progress Report to informed criticism, in view of the Commission's failure to act on QUALCOMM's Motion to Strike that Report, which Motion raised the ex parte issue, and in view of the Commission's reliance on that Report^{5/}, QUALCOMM respectfully requests that you take appropriate action pursuant to the Commission's ex parte rules.

Respectfully submitted,

QUALCOMM Incorporated

By: 

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cc: All Parties of Record

^{5/} Omnipoint suggests that the Commission did not rely upon the Progress Report in its denial of QUALCOMM's pioneer's preference request. Given the paucity of correct references in the Third Report and Order, QUALCOMM is not as certain as Omnipoint of which parts of the record the Commission may have relied upon for which findings. It is, nevertheless, indisputable that the Commission relied upon the Progress Report in this proceeding. See Third Report and Order at n. 68.

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February 8, 1994

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RE: General Docket No. 90-314, Amendment of the Commission's
Rules to Establish New Personal Communications Services

Dear Mr. Fishel:

QUALCOMM Incorporated, by its attorneys and pursuant to Section 1.1214 of the Rules and Regulations of the Federal Communications ("FCC" or "Commission"), hereby undertakes to advise you of an apparent violation of the Commission's ex parte rules which are codified at 47 C.F.R. § 1.1200 et seq.

In Gen. Docket No. 90-314 the Commission has considered both the rulemaking and pioneer's preference aspects of the introduction of Personal Communication Services ("PCS"). The Commission has determined that the portions of this proceeding concerned with pioneer's preferences are restricted and that ex parte contacts are prohibited. Tentative Decision and Memorandum Opinion and Order, Amendment of the Commission's Rules to Establish New Personal Communications Services, 7 FCC Rcd 7794, 7813 (1992).

On August 19, 1993 Omnipoint Corporation filed a "Semi-Annual Experimental License Progress Report."¹ The Report was not served upon any of the parties to this

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proceeding. The Report, in both its text and in an Attachment, included repeated explicit and disguised references to QUALCOMM, criticizing QUALCOMM's proposed Personal Communications Services technology upon which its request for pioneer's preference is based. In this respect, Omnipoint exceeded the requirement of its experimental license that it report on the progress of its own experiments. The gratuitous remarks concerning QUALCOMM are clearly outside the scope of any exemption to the ex parte rules which Omnipoint may enjoy by virtue of Section 1.1204(b)(1).

On September 15, 1993, after becoming aware of the existence of the Omnipoint Report, QUALCOMM filed a Motion to Strike the Experimental Report, requesting that it not be included in the record of this proceeding. In addition, in its Motion QUALCOMM informed the Commission that it believed the Omnipoint Report was a prohibited ex parte presentation. Omnipoint opposed this Motion, but did provide a revised Amendment to the Report in which specific references to QUALCOMM, but not to QUALCOMM's CDMA PCS technology, were deleted. In a footnote Omnipoint agreed to be "willing to replace" the Attachment with the revised version. However Omnipoint did not request that the Commission make such a replacement. Moreover, Omnipoint made no effort to revise the specific textual references to QUALCOMM and to QUALCOMM's PCS technology.

On February 3, 1994 the Commission released its Third Report and Order in Gen. Docket No. 90-314, FCC 93-550. In that Report and Order, the Commission failed to act upon QUALCOMM's Motion to Strike. The Commission did, however, rely upon Omnipoint's Report. In fact, at Footnote 68, the Report and Order cites to the first page which was the subject of QUALCOMM's Motion to Strike.²

In view of the Commission's failure to act on the QUALCOMM Motion to Strike and the Commission's reliance on the material contained in that Report, it is now

²

However, QUALCOMM is unable to find the sentence referred to by the Commission on the page cited in Footnote 68. Indeed, QUALCOMM finds that virtually none of the Commission's few citations to Omnipoint's filings are correct.

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necessary to bring this matter to the Commission's attention again. In doing so, QUALCOMM respectfully requests that you take appropriate action pursuant to the Commission's ex parte rules, 47 C.F.R. § 1.1216.

Respectfully submitted,

QUALCOMM Incorporated

By:



Veronica M. Ahern

Albert Shuldiner

Its Attorneys

cc: Douglas G. Smith, Omnipoint Corporation
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CERTIFICATE OF SERVICE

I, Michelle Richardson, hereby certify that copies of the forgoing Ex Parte Presentation of QUALCOMM Incorporated were served via first-class, postage-prepaid mail, or by hand delivery where indicated by an asterisk (*), on this 11th day of March, 1994, to the parties listed below.

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